United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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P/S

76-4111

United States Court of Appeals
For the Second Circuit

JORGE ANTONIO MELARA ESQUIVEL,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR REHEARING IN BANC

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
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JORGE ANTONIO MELARA ESQUIVEL, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	76-4111

PETITION FOR REHEARING IN BANC

This petition for rehearing in banc is filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

This case was decided adversely to petitioner solely on the basis that petitioner had not demonstrated that his pre-existing file could not have been retrieved by the Immigration Service, (INS) merely by knowing his name, without relying on other evidence obtained at the time of his arrest. The Court's holding is predicated, in part, upon the decision of the Fifth Circuit in United States v. Martinez, 512 F.2d 830, 832 (5th Cir. 1975).

It is respectfully submitted that the Court overlooked the considerable showing contained in public documents which are contained in the appendix, indicating that it was most improbable that the INS could have located petitioner's file based on his name alone. We also submit that the decision in United States v. Martinez relied on by the Court supports a contrary holding.

In petitioner's appendix, we have reproduced substantial portions of a report entitled "Where's What, Sources of Information for Federal Investigators," which was prepared by the Office of

Security of the Central Intelligence Agency under a Brookings Institution Federal Executive Fellowship (A48-56), the relevant portions of the report, which deal specifically with the records of the Immigration and Naturalization Service read as follows:

> "The master index of the Immigration and Naturalization Service contains 40,000,000 documents; the accession rate is 3,000,000 a year. It consists of all persons on whom an "A" file has been opened, including all persons naturalized since September 27, 1906, and those nonimmigrants who have departed from the United States." It is the first step in checking the records and the more information furnished, the easier it is to check the record.
>
> "The Immigration and Naturalization Service operates on a decentralized basis in that the alien's file follows him.
>
> [A52. Emphasis added]
>
> "Investigators desiring to check the record of arrival and/or departure of a nonimmigrant must furnish as much information as possible, particularly his or her full name, citizenship and date of birth."
>
> [A51. Emphasis added]

The above quoted language clearly creates a presumption that the information gained by Service Officers as the result of the arrest and detention of petitioner -- which undoubtedly included his name, date of birth, country of citizenship and prior immigration history -- was of considerable assistance to the Government in proving its case against petitioner, and therefore constituted the exploitation of an unlawful act under Wong Sun v. United States, 371 U.S. 471 (1963).

During the course of oral argument in this matter, the Assistant United States Attorney represented to the Court that he had personally been able to obtain the petitioner's immigration file by simply stating petitioner's name over the telephone. While we do not question the accuracy or the good faith with which this statement was made, it is quite possible that the instant response received from the Service record bank was greatly facilitated by the previous use of petitioner's file in connection with his deportation case. In any event, we respectfully submit that testimonial representations by Counsel at oral argument -- no matter how well intentioned -- are no substitution for a proper evidentiary hearing, held in connection with deportation proceedings. As explained in detail in petitioner's brief, no such opportunity was afforded to him by the Immigration Service, which declined to permit petitioner to challenge the evidence against him in a separate proceeding. Hence, if petitioner had sought to prove that his file could not have been obtained without the information extracted from him, his hearing testimony abone, would have been enough to establish his deportability.

We also wish to note that the Martinez case, supra, which was relied on by the Court supports the proposition that there should be an evidentiary hearing upon the question of whether or not the use of pre-existing service records constitute the exploitation of an unlawful act. In that case, the Court in its opinion (512 F. 2d 830 at 832) referred to the testimony of the involved INS officer and the facts developed at hearing in order to substantiate its holding that on the facts before it the use of pre-existing records did not constitute use of the fruit of the poison tree.

We also invite the attention of the Court to the views of the Court of Appeals for the District of Colombia as expressed in Au Yi Lau v. INS, 445 F. 2d 217 (1971) in which the evidence sought to be suppressed in the deportation hearing of aliens who had allegedly been questioned illegally was obtained both from Service files and the aliens themselves. The Court stated (445 F. 2d at 224, footnote 11):

> "The Government points out that the remainder of the documentary evidence (Hong Kong discharge books and Hong Kong and Australian seamen's identity cards) consisted of identification papers located in the files at the immigration office. The record does not make this fact clear. However, even if this were true, we think it not unlikely that their availability may have been dependent upon determining what date and in what place petitioners entered the country." [Emphasis added]

CONCLUSION

On the basis of the above, we respectfully request that the Court rehear this matter in banc, that the outstanding order of deportation be set aside and that the matter be remanded to the Immigration Service for a full evidentiary hearing upon Petitioner's Motion to Suppress the evidence used to establish his deportability.

Respectfully submitted,

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Dated: New York, N. Y.
October , 1976

FRIED FRAGOMEN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25 day of Oct. , 1976 at No. 1 St. Andrews Pl. NYC 4 Floor deponent served the within Petition upon : Asst. U.S. Atty. Thomas Belote the Respondent herein, by delivering ~~a~~ 3 true copies ~~copy~~ thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Respondent therein.

Sworn to before me,
this 26 day of Oct. 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0152945
Qualified in Richmond County
Commission Expires March 30, 19~~XX~~ 1978